Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
The State of Minnesota Petition for	)	CC Docket No. 98-1
Declaratory Ruling Concerning Access to	)	
Freeway Rights-of-Way Under Section 253	)	

OPPOSITION OF NATIONAL CABLE TELEVISION ASSOCIATION TO MINNESOTA'S PETITION FOR DECLARATORY RULING

Daniel L. Brenner
Neal M. Goldberg
David L. Nicoll
1724 Massachusetts Avenue, N.W.
Washington, D.C. 20036
202-775-3664

Counsel for National Cable Television Association, Inc.

March 9, 1998

TABLE OF CONTENTS

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
The State of Minnesota Petition for	)	CC Docket No. 98-1
Declaratory Ruling Concerning Access to	)	
Freeway Rights-of-Way Under Section 253	)	

OPPOSITION OF NATIONAL CABLE TELEVISION ASSOCIATION TO MINNESOTA'S PETITION FOR DECLARATORY RULING

The National Cable Television Association ("NCTA") hereby opposes the Petition for Declaratory Ruling filed by the State of Minnesota ("Petition") concerning Minnesota's proposal to grant exclusive access to the State's freeway rights-of-way to a wholesale provider of fiber optic transport capacity.[1] NCTA is the principal trade association of the cable television industry in the United States. It members include owners and operators of cable television systems serving over 80 percent of the nation's cable television households. NCTA's members provide and intend to provide local exchange service throughout the United States. As such NCTA and the cable industry in general have an interest in the outcome of this proceeding.

INTRODUCTION AND SUMMARY

On December 23, 1997, the State of Minnesota (the "State") entered into an agreement with ICS/UCN LLC (the "Developer") and Stone & Webster Engineering Corporation, under which the Developer has exclusive access to certain State freeway rights-of-way ("ROW") for

---

1 Public Notice, "Commission Seeks Comment on Minnesota Petition For Declaratory Ruling Concerning Access to Freeway Rights-of-Way under Section 253 of the Telecommunications Act," CC Docket No. 98-1, DA 98-32, January 8, 1998.

longitudinal, or parallel, installation and maintenance of fiber optic cable. In exchange, the Developer will provide the State with a share of lit and dark capacity on the network, which the State will use for its telecommunications needs, including operation of an Intelligent Transportation System.[2] The Agreement also requires the Developer to (1) install, concurrently and parallel with its own fiber cable, capacity to be owned and used by third parties and (2) make available through purchase or lease wholesale fiber transport capacity for both dark and lit fiber.[3]

The State petitioned the FCC for an expedited declaratory ruling that its proposed agreement to grant a wholesale provider of fiber optic transport capacity exclusive access to State freeway rights-of-way ("The Agreement") is consistent with section 253 of the Communications Act, as amended.[4] Under Section 253(a), no State or local statute or regulation or other legal requirement may "prohibit or have the effect of prohibiting the ability of any entity to provide interstate or intrastate telecommunication services." Section 253(b) permits States to impose competitively neutral requirements necessary to preserve universal service, protect public safety, ensure telecommunications quality, and safeguard the rights of consumers. (States may also impose restrictions on the competitive provision of telecommunications services in areas served by rural telcos.). Finally, under Section 253(c), State and local governments retain authority to manage public rights-of-way and require fair and reasonable compensation from telecommunications providers (including cable operators to the extent they provide telecommunications services) on a competitively neutral and nondiscriminatory basis.

---

2 Agreement at 1.

3 Id. at 10.

4 47 U.S.C. §253.

Minnesota makes a number of arguments to support its view that the Agreement is consistent with Section 253. First, the State argues that section 253 applies only to telecommunications services and not telecommunications infrastructure.[5] It claims that because the Developer does not provide telecommunications services (although its affiliates may) and is contractually restrained to constructing transport capacity for wholesale lease or sale, Section 253 does not apply.[6]

Second, Minnesota argues that, even if section 253 (a) applies to infrastructure investment, the Agreement does not violate it.[7] It contends that the availability of fiber optic capacity and alternative ROW in the State is so great that the Agreement does not have the effect of prohibiting the ability of any entity to provide interstate or intrastate telecommunications service.[8] In addition, the Petition argues that the requirement that the Developer collocate fiber of other entities in the ROW and sell or lease facilities to other entities on a non-discriminatory basis makes the Agreement functionally non-exclusive.[9]

Finally, the State contends that, even if the Agreement implicates section 253(a), sections 253(b) and (c) preserve the right of the States to protect the public safety and manage their ROW and the grant of exclusivity for the freeway ROW represents a legitimate exercise of

---

5 Petition at 13.

6 Id. at 14.

7 Id. at 17.

8 Id. at 4, 18.

9 Id. at 4, 19.

this authority.[10] The Petition asserts that competitive neutrality does not require "equal treatment," but rather that the State not unfairly favor one provider over another.[11] The Petition concludes that the State satisfied competitive neutrality by engaging in an open and fair Request for Proposals process and awarding the contract to the most advantageous provider.[12]

For the reasons stated below, the Commission should reject the Minnesota Petition and declare that the Agreement is preempted under the authority of section 253. But if the Commission approves the type of exclusive arrangements described in the Petition, competitive providers of telecommunications services would be forced to lease capacity from a pre-determined wholesale provider rather than construct their own facilities in the freeway rights-of-way. Such a result would be contrary to the letter and spirit of Section 253.

I. SECTION 253(a) APPLIES TO THE EXCLUSIVE CONTRACT WHICH IS THE SUBJECT OF THE MINNESOTA PETITION

Minnesota contends that Section 253(a) does not apply to the arrangement it has with Developer because that provision "is aimed at services to the public, not infrastructure."[13] Claiming that the Developer is "not a provider of telecommunications services," the Petition asserts that that Section 253(a) is inapplicable in this case. This argument is totally without merit.

---

10 Id. at 26-27.

11 Id. at 28, 30.

12 Id. at 28.

13 Id. at 13.

The Minnesota argument ignores the plain meaning of Section 253(a) as well as the legislative purpose behind that provision. Section 253(a) states that "No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service." To the extent that any State-sanctioned "legal requirement" -- such as the exclusive contract at issue in this case -- has the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service, that requirement is barred by Section 253(a), unless it satisfies the exemptions in Sections 253(b) or (c). Whatever form the State-sanctioned requirement may take, the critical query is what is the effect of that requirement. As we show in the following section, the exclusive contract at issue here does have the effect of prohibiting the ability of entities to provide telecommunications services and, as a result, Section 253(a) is applicable.

Commission precedent is consistent with a reading of Section 253(a) that applies to State requirements governing infrastructure as well as those directly affecting services. In Public Utility Commission of Texas,[14] the Commission preempted certain build-out requirements enacted by the Texas legislature under which facilities-based new entrants would be authorized to provide local telecommunications services subject to the challenged build-out requirements. In so holding, the Commission said:

> [S]ection 253(a) of the Act bars state or local requirements that restrict the means or facilities through which a party is permitted to provide service, i.e. new entrants should be able to choose whether to resell incumbent LEC serv-

---

[14] Public Utility Commission of Texas, CCB Pol 96-13, Memorandum Opinion and Order, FCC 97-346, released October 1, 1997.

> ices, obtain incumbent LEC unbundled network elements, utilize their own facilities, or employ any combination of these three options.[15]

It continued:

> In Section 253(a), Congress decreed that no state or local statute or regulation may "prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service." The statutory definition of 'telecommunications service' provides, in relevant part, that a telecommunications service is 'the offering of telecommunications for a fee directly to the public ... regardless of the facilities used. Thus, these two provisions, read together, provide that no state or local requirement may prohibit or have the effect of prohibiting any entity from providing any offering of telecommunications directly to the public for a fee regardless of the facilities used.[16]

For these reasons, if the Minnesota exclusive contract has the effect of prohibiting the ability of any entity to provide telecommunications services -- even an "indirect" effect -- as might be argued here, it is subject to section 253(a). Minnesota's attempt to rely on a fallacious distinction between facilities and services must be rejected.

II. THE AGREEMENT VIOLATES SECTION 253(a)

The legislative history of the 1996 Act makes clear that Congress intended to remove all legal and regulatory barriers to entry.[17] Inhibiting entry into state and local markets is precisely the interference that Congress sought to prohibit in enacting Section 253 of the 1996 Act. The hallmark of the 1996 Act is the promotion of competition in interstate and intrastate telecommunications service, to be accomplished in large part through the removal of barriers to competitive

---

15 Id. at ¶74 (emphasis added).

16 Id. (emphasis in original).

17 See H.R. Rep. No. 458, 104th Cong., 2d at 126-27 ("Conference Report") (adopting the Senate provisions, which were "intended to remove all barriers to entry in the provision of telecommunications services.")

entry.[18] As the FCC itself noted, the 1996 Act "envisions that removing legal and regulatory barriers and reducing economic impediments to entry will enable competitors to enter markets freely, encourage technological developments, and ensure that a firm's prowess in satisfying consumer demand will determine its success or failure in the marketplace."[19]

The Agreement has the effect of prohibiting the ability of entities to provide telecommunications services in Minnesota, and, as such, it violates Section 253(a). In determining whether a State or local requirement has the requisite effect, the Commission will consider "whether the requirement in question materially inhibits or limits the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment."[20] The Minnesota exclusive contract has just that effect.

The State argues that facilities-based competitors are not harmed by the agreement because they have many alternative means of reaching their customers. It contends that existing fiber facilities already serve 100% of the traffic needs of the state, and there is sufficient unlit capacity to significantly increase capacity without constructing additional facilities. Moreover, technological advances in electronics used to light fiber have greatly increased the bandwidth of existing fiber. New entrants that wish to offer telecommunications services, it maintains, "will

---

18 See Conference Report at 113 (the purpose of the Act is "to provide for a procompetitive, deregulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition").

19 Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Notice of Proposed Rulemaking, CC Docket No. 96-182, at ¶1 released April 19, 1996.

20 Pittencrieff Communications, File No. WTB/POL 96-2, Memorandum Opinion and Order, FCC 97-343, released October 2, 1997, at ¶32.

be able to purchase or lease transport capacity from existing providers as well as the Developer at competitive market-based prices."[21] And, the availability of previously unavailable rights-of-way, even though they are provided by the State on an exclusive basis, will increase the supply of transmission capacity, further enhancing competition.

The cumulative result of these alternatives, Minnesota would have the Commission believe, is to make the State's proposal not in violation of Section 253(a) because so many other competitive alternatives are present. In this regard, the State contends that the competitive market for transport is not "materially restricted" because alternative fiber optic capacity and right-of-way is so great.[22] The State further claims that, by requiring the Developer to collocate fiber and other facilities in the right-of-way, and to sell or lease facilities to others on a nondiscriminatory basis, the Agreement is made functionally non-exclusive.[23]

The State's argument fails on several counts. First, Section 253(a) specifically provides that "No State ... statute or regulation, or other State ... legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service."[24] The Development Plan does just that. It is a State legal requirement. Potential new providers of telecommunications services are entities that intend to provide facilities-based telecommunications service competition. But these entities will be impeded in their

---

21 Petition at 22-23.

22 Id. at 23.

23 Id. 4, 19.

24 47 U.S.C. § 253(a) (emphasis added).

ability to offer facilities-based competition if the Development Plan goes forward because of the monopoly granted to the Developer by the State.

Minnesota contends that the Development Plan is nevertheless appropriate because existing providers will be able to expand capacity by utilizing currently unlit capacity, and even new facilities-based entrants can be accommodated through means other than the rights-of-way at issue in the Agreement. The State points out that "[a]lternative rights-of-way along railroads, gas pipelines, oil pipelines and electric power lines, as well as state and country roads, provide thousands of miles of rights-of-way for construction within the state."[25]

This argument will not withstand scrutiny. As to existing providers, even if the State is correct that their needs could be met by using their unlit fiber, it does not follow that they may not benefit if they are able to employ the facilities that the State proposes to offer through the Developer on a monopoly basis. An incumbent, for example, might prefer to use the State rights-of-way because their location is situated in closer proximity to the customers that the incumbent wants to serve. As for the "alternative rights-of-way" supposedly available to existing and potential providers, virtually none of the utilities cited have an obligation to make their rights-of-way available to telecommunications service providers. Accordingly, the exclusive contract has the effect of "materially inhibit[ing] or limit[ing] the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment," a result prohibited by section 253(a).

---

[25] Petition at 23.

New facilities-based providers will be even more seriously disadvantaged. They do not have the option of expanding capacity by more efficiently employing existing facilities. New providers will be forced to rely upon the facilities of incumbents. If the State's plan goes forward, the Developer will become one of the incumbents upon whom new entrants will be required to rely. Minnesota's action establishes the Developer in a favored role. Worse, it discriminates against new facilities-based competitors in the marketplace and will effectively deny to these new entities the ability to provide facilities-based communications services.

Minnesota advances the separate rationalization that the Development Plan does not effectively deny telecommunications services to existing and new facilities-based providers because they have the alternative of leasing capacity from the Developer. Under the Agreement between the State and the Developer, the Developer must sell or lease capacity on a nondiscriminatory basis. This, according to the State, will assure that more lit fiber capacity will be available, which will drive down the cost of capacity through the market process to the benefit of users.

But the lease alternative does not save the proposal. Section 253(a) bars state legal requirements that "have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service." As this Commission held in the Public Utility Commission of Texas case, "Section 253(a) bars state or local requirements that restrict the means or facilities through which a party is permitted to provide service, i.e., new entrants should be able to choose whether to resell incumbent LEC services, obtain incumbent LEC unbundled network elements, utilize their own facilities, or employ any combination of these three options."[26] By

---

[26] Public Utility Commission of Texas, at ¶ 74.

forcing potential facilities-based providers into the choice of leasing, it forecloses one of the options the 1996 Act was to provide to competitors.

Finally, Minnesota argues the Developer is obliged to allow competitors to install "non-network" capacity on behalf of any entity on a nondiscriminatory basis when it installs its own fiber, and this requirement will further alleviate the potential competitive risks associated with the project. But as the State acknowledges, under the rules of the project "installation of non-network capacity must occur at the same time as installation of network capacity."[27] The State maintains this condition is necessary "to avoid unnecessary intrusion on freeway rights of way."[28] Whatever its motivation, however, this simultaneity condition effectively excludes competitors as facilities-based providers using these rights of way except in the limited time periods provided for in the agreement between the Developer and the State. A simultaneous construction duty violates the letter and the spirit of Section 253(a) by effectively inhibiting the ability of competitors to provide facilities-based telecommunications services at advantageous locations on their own timetables. The Commission therefore should preempt the Agreement pursuant to its Section 253(a) authority.

III. NEITHER SECTION 253(b) NOR 253(c) JUSTIFY GRANTING MINNESOTA'S PETITION

Minnesota maintains that irrespective of whether the Agreement has the effect of a State prohibition on interstate or intrastate telecommunications services, it has other authority contained in other sections of the statute to implement its plan. Citing Sections 253(b) and 253(c),

---

27 Petition at n.20.

28 Id.

Minnesota argues that these provisions preserve "the pre-existing rights of states to protect public safety and to manage their rights-of-way"[29] and are sufficient to sanction its plan.

Section 253(b) preserves a State's authority to impose competitively neutral requirements necessary "to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers."[30] Section 253(c) of the 1996 Act reaffirms the authority of State and local governments to "manage the public rights-of-way,"[31] or to require compensation for use of public rights-of-way "on a nondiscriminatory basis."[32] Neither validates Minnesota's position.

First, sections 253(b) and 253(c) must be read in context with section 253(a). Taken together, these provisions prohibit any State or local requirement, even one adopted under the guise of rights-of-way management, that acts as a barrier to entry into the telecommunications marketplace.

Second, Minnesota bases its section 253(b) argument on the claim that "[t]he purpose for granting a right of exclusive access is to protect the safety of the traveling public and transportation workers,"[33] the theory being that the State must limit access to its rights-of-way for installation and operation of fiber optic cable. But Minnesota offers no evidence to support its claim

---

29 Id. at 2.

30 47 U.S.C. § 253(b).

31 Cities' abuse of their right-of-way authority to develop onerous cable franchising requirements was one of the primary reasons for the enactment of the Cable Communications Policy Act of 1984. See, e.g., H. Rep. No. 934, 98th Cong.. 2d Sess. 21-22, 25-26 (1984).

32 47 U.S.C. §253(c).

33 Petition at 28.

that the public safety would be harmed if it did not enter into an exclusive contract. Moreover, since Section 253(b) only exempts state requirements "necessary" to protect the public safety and welfare, it is incumbent upon Minnesota to demonstrate that the exclusive contract is necessary to promote its asserted interest in public safety. It would be difficult, if not impossible, for Minnesota to so demonstrate, since elsewhere it has conceded that exclusivity was included to assist the Developer in obtaining financing needed for construction of the state-wide network contemplated by the Agreement.[34]

Third, even if the State could show that the Agreement was necessary to protect the public safety and welfare, to satisfy section 253(b) it must also prove that the Agreement's requirements are "competitively neutral." This it cannot do, for the same reasons discussed above showing that the Agreement violates section 253(a).

Fourth, Minnesota's reliance on Section 253(c), which affirms the authority of a State or local government to manage the public rights of way or to require fair and reasonable compensation from telecommunications providers on a competitively neutral and nondiscriminatory basis, is misplaced. This lavish interpretation of "management" authority to include the right effectively to deny access to state rights-of-way is inimical to the competitive concerns underlying the 1996 Act, to the concept of a state or locality's right of way authority generally, to the preemption authority granted to the Commission in Section 253(d), and to the concept of competitive neutrality expressed throughout Section 253. Any other interpretation also defies common sense because it would allow the "management" magic wand to cause to disappear entirely the Act's

---

[34] Agreement at 11.1(a).

general prohibition on laws, regulations and requirements that constitute barriers to competitive entry.

As the Commission has said on several occasions, certain limited activities fall within the ambit of appropriate rights-of-way management. These include "coordination of construction schedules, determination of insurance, bonding and indemnity requirements, establishment and enforcement of building codes, and keeping track of the various systems using the rights-of-way to prevent interference between them."[35] While these determinations were made in the context of the assertion of a municipality's rights-of-way authority, they are instructive as to the permissible bounds of a State's authority under the statute as well. Nothing in the list enumerated by the Commission can be construed to permit the exclusive contract at issue in this case.

Finally, even if the exclusive contract were held to be within the state's rights-of-way management authority under section 253(c), for the reasons stated earlier the State in this case has not exercised its authority on the "competitively neutral" basis required by the section, and, for that reason as well, it must be preempted.

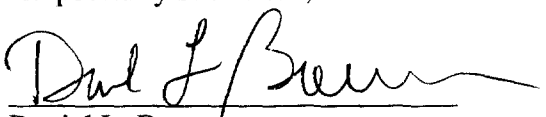
---

35 TCI Cablevision of Oakland County, Inc., CSR-4790, Memorandum Opinion and Order, FCC 97-331, released September 19, 1997, at ¶103. See also, Classic Telephone Inc., 11 FCC Rcd. 13082, 13103 (1996); Implementation of Section 302 of the Telecommunications Act of 1996: Open Video Systems, CS Docket No. 96-46, FCC 96-312, Second Report and Order and First Order on Reconsideration, 11 FCC Rcd 18223, 18330(1996); Third Report and Order and Second Order on Reconsideration, CS Docket No. 96-46, FCC 96-334, released August 8, 1997.

CONCLUSION

For the reasons stated above, the Commission should deny Minnesota the relief requested in its Petition and should hold that the State's exclusive Agreement with the Developer is pre-empted by Section 253(a).

Respectfully submitted,



Daniel L. Brenner
Neal M. Goldberg
David L. Nicoll
1724 Massachusetts Avenue, N.W.
Washington, D.C. 20036
202-775-3664

Counsel for National Cable Television Association, Inc.

March 9, 1998